

Commercial Rules for Government Contracts

Acquisition Advisory Council
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ABBREVIATED SUMMARY

This Is A Proposal For Legislation To Provide That The Law Governing The Interpretation Of, The Performance Of, And The Liabilities Of The United States And Its Agencies Under Federal Government Contracts Shall Be The Same As The Rules Of Law Generally Applicable To Contracts Between Private Parties, Except As Otherwise Required By The Constitution, Federal Statutes, Or By A Contract Clause Mandated By The Federal Acquisition Regulation.

Additional Proposed Legislation Also Is Recommended.

Background

A. Sovereignty

B. The King Can Do No Wrong

Sovereign Immunity

- Federal Government

- State Governments and Subdivisions
 - Counties
 - Municipalities
 - School Districts
 - Other Local Government Entities

Types of Sovereign Immunity

- Liability

- Suit

Waiver of Sovereign Immunity

Federal Government

Tucker Act

Federal Tort Claims Act

States

Local Governments

The Federal Government Acts in Dual Capacities

1. Sovereign
2. Contractor

The Two Characters Which the Government Possesses As A Contractor And As A Sovereign Cannot Be Fused.

Horowitz v. United States, 267 U.S. 458 (1925).

If The Government Comes Down From Its Position Of Sovereignty And Enters The Domain Of Commerce, It Submits Itself To The Same Laws That Govern Individuals There.

Cooke V. United States, 91 U.S. 237 (1875).

The United States, When They Contract With Their Citizens, Are Controlled By The Same Laws That Govern The Citizens In That Behalf. All Obligations Which Would Be Implied Against Citizens Under The Same Circumstances Will Be Implied Against Them.

United States V. Bostwick, 94 U.S. 53 (1877).

More Recent Cases Express The View That:

When The United States Enters Into Contractual Relations, Its Rights And Duties Therein Are Governed Generally By The Law Applicable To Contracts Between Private Individuals.

Lynch V. United States, 292 U.S. 571 (1934).

United States V. Winstar Corp., 518 U.S. 839 (1996) (Plurality Opinion).

Mobile Oil Exploration & Producing Southeast, Inc. V. United States, 530 U.S. 604 (2000) (Majority Opinion).

Franconia Associates V. United States, 536 U.S. 129 (2002) (Unanimous Opinion).

Note The Word “Generally” In The Statement Of The Rule.

Exceptions to Government Being Subject to Common-Law Commercial Contract Rules:

1. Constitution of the United States
 - a. Appropriations Clause
 - b. Treaties
 - c. Commerce Clause
2. Federal Statutes (Examples Only)
 - a. Authorization and Appropriation Act Limitations
 - b. Defense Production Act
 - c. Forfeiture of Claims
 - d. False Statement Act
 - e. False Claims Act
 - f. Truth-in-Negotiations Act

Judicial Exceptions to Supreme Court's Statements

1. Some Judicial Exceptions May Result From Failure to Recognize or Apply The Distinction Between The Government's Actions In Its Sovereign And Contractual Capacities
2. Some Courts Fail to Explain Reasoning

Presumption of Regularity of Actions of Government Officials

- Historical Basis Is Presumption Against Misconduct
- Historically Applied To Private Parties As Well As Government Officials
- Common Law Uses Presumption As Rule Of Evidence
- In Government Contracts, Presumption Used to Favor Government In Disputes

The presumption is that government officials perform their duties correctly and fairly, and the burden to overcome that presumption is a heavy one.

Imperial Properties/Construction. Inc., ASBCA 49899, 01-1 BCA ¶ 31,382.

Examples of Presumption of Regularity Favoring Government

The Reasonableness Of Reprocurement Costs Was Properly Tested.

Solar Laboratories, Inc., ASCBA No. 19957, 76-2 BCA
¶ 12,115 at 58, 197-98.

The Government's Deduction From Contract Payments Was Justified.

W.B.&A., Inc., ASBCA No. 32524, 89-2 BCA
¶ 21,736 at 109,329.

The Government Test Results Were Accurate.

Tempo, Inc., ASBCA Nos. 32589 et al., 95-2 BCA
¶ 27,618 at 137, 661-62.

Estoppel

Doctrine of Equitable Estoppel May Be Invoked To Avoid Injustice.

Some Cases Hold Affirmative Misconduct Is A Prerequisite For Invoking Equitable Estoppel Against The Government.

See *Rumsfield v. United Techs. Corp.*, 315 F.3d 1361 (Fed. Cir. 2003).

Some Decisions Say The Government Will Not Be Estopped On The Same Terms As Other Litigants.

Zacharin v. United States, 213 F.3d 1366 (Fed. Cir. 2000).

Presumption of Good Faith

Presumption Originally Applied To Both Parties To Contracts.

In Government Contracts, There Is A Strong Presumption That Government Officials Act In Good Faith.

Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).

Presumption May Be Appropriate For Actions In Government Sovereign Capacity, But Should Not Be Used To Give Government An Advantage In Contractual Disputes.

Section 1423 Of SARA Directed Acquisition
Advisory Panel To Review Laws, Regulations, And Policies
With A View Toward Ensuring Effective And Appropriate
Use Of Commercial Practices.

This Panel Has Opportunity To Recommend A Bold
Stroke To Comply With The Congressional Mandate By
Recommending Legislation To Implement Supreme Court's
Language.

Recommendation

- Original Recommendation – May 5, 2005
- Revised Recommendation – December 12, 2005

Four Paragraphs In Revised Recommendation For
Legislation:

(1) Except as otherwise either required by the Constitution of the United States or expressly required by a federal statute or by a contract clause required by the Federal Acquisition Regulation to be included in the particular contract, the rules of law that govern of interpretation of, performance of, and liabilities of, the United States and its agencies under federal government contracts for the acquisition of goods and services shall be the same as the rules of law generally applicable to contracts between private individuals and business entities.

(2) (a) The Federal Acquisition Regulation Council shall promptly undertake a systematic review of contract clauses mandated by the Federal Acquisition Regulation to determine (i) whether and to what extent particular provisions depart from commercial norms in the private sector in respects not required by federal statutes or the Constitution of the United States, and (ii) whether or not there is a good public policy basis for any such departures from such commercial norms that are not required by federal statutes or the Constitution of the United States.

(b) The Council shall initiate the process of instituting changes in the existing mandatory contract clauses to bring them into conformity with commercial norms applied in the private sector where departures from such norms are neither required by the Constitution of the United States nor by existing federal statutes and do not have a good basis in public policy.

(3) Nothing in this statute shall alter the existing rules of law governing the "choice of law" for disputes relating to federal government contracts. Federal acquisition law shall be interpreted to produce a nationally uniform body of principles that shall constitute federal law and, except as expressly otherwise provided by law, shall not be construed to vary from state to state.

(4) Nothing in this statute shall alter the existing rules of law governing formation of federal government acquisition contracts.